APPEAL NO. 991836

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 30, 1999. He (hearing officer) determined that the respondent (claimant) was entitled to supplemental income benefits (SIBS) for the 10th quarter. The appellant self-insured appeals this determination, contending that it is contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

This is a no ability to work SIBS case determined under the so-called "old rules."

The claimant sustained a compensable injury on _____, for which he was assigned a 30% impairment rating. Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The 10th quarter was from May 1 to July 30, 1999, and the filing period for this quarter was from January 30 to April 30, 1999.

Although the claimant made numerous employment contacts during the filing period, he testified that he did this only because he was told by the self-insured that he had to and had no expectation of employment. Rather, he contends that he had no ability to do any work during the filing period. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment

generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The medical evidence relied on by the claimant consists primarily of the opinion of Dr. S, his treating doctor. As early as July 1998, Dr. S described the claimant as "totally disabled and cannot return to work." On April 6, 1999, during the filing period, he stated that "I do not feel [claimant] can return to any job because of his combination of injuries which limits his ability to sit for prolonged periods of time, stand, walk, lift, stoop or look up. In addition, he is on several medicines that will impair his ability to think and follow directions." During this period of time, Dr. S also reviewed several potential jobs identified by the self-insured for the claimant and concluded that the claimant could not meet the requirements of those jobs. At the same time, the self-insured referred the claimant to Dr. V for examination and determination of his work status. At his original examination on December 16, 1997, Dr. V concluded that the claimant was "totally and permanently disabled." Dr. V again examined the claimant on September 9, 1998, and this time concluded he was "capable of working light duty." At an examination on January 20, 1999, Dr. V found the claimant able to work at the sedentary level. On June 1, 1999, the claimant's attorney wrote Dr. V and asked him "if you agree with the conclusion of [Dr. S] that [claimant] should not return to work because of his physical condition and the medication that he is taken [sic.]." On June 8, 1999, Dr V responded to the attorney that Dr. S's opinion "should be honored. It is my opinion, that since he was the physician primarily responsible for [claimant's] care, his opinion should supersede my own."

The hearing officer found that the claimant had no ability to work during the 10th quarter filing period. He also found that Dr. V on June 8, 1999, agreed with Dr. S. In its appeal, the self-insured argues that "the only reason" Dr. V agreed with Dr. S was because the latter was the treating physician and that it is "simply a game of semantics that [Dr. V] 'altered his opinion.'" The self-insured carrier also argues that Dr. S's opinion was conclusory in nature and confuses the concepts of "employability" and "capacity to work." As noted above, whether the claimant had any ability to work was a question of fact for the hearing officer to decide. Thus, even assuming that Dr. V maintained a contrary position to Dr. S or that Dr. V somehow improperly changed his opinion on this question, this would not preclude the hearing officer from giving more-weight to Dr. S's opinion. As to the distinction between capacity and employability suggested by the carrier on appeal, we observe that the hearing officer could infer from Dr. S's opinion that he was addressing his ability to work under a common sense meaning of that term and that a conclusion of no ability to work is not inconsistent with an opinion that the claimant is not totally incapacitated from performing even the simplest of basic life functions. This latter capacity was amply demonstrated by his appearance at the CCH. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a

factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the opinion of Dr. S sufficient to support the finding that the claimant had no ability to work during the relevant filing period.

We also find the evidence sufficient to support the direct result determination. See Texas Workers' Compensation Commission Appeal No. 960028, decided February 15, 1996.

While a different result may well obtain under the new SIBS rules, for the foregoing reasons we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge